disputed, the court can allow evidence to be adduced to enable it to consider whether or not there was a *bona fide* dispute and the court is competent to go into the evidence to consider that question for the purpose ultimately of determining whether it should exercise the discretion: *Re Welsh Brick Industries Ltd.*[1]

For the respondent company, the case of *In re A Company*[2] was cited to us. In that case, it was held that where a petition against a company is presented ostensibly for a winding-up order, but really for another purpose, such as putting pressure on a company, the court has an inherent jurisdiction to prevent such an abuse of process, and will do so, without requiring an action to be commenced, by restraining the advertisement of the petition, and staying all proceedings upon it. It was contended that the purpose of the appellant in bringing the present petition was to put pressure on the respondent company and thereby to induce it to pay a sum which is not due and owing, and to cause irreparable damage to the respondent company by advertisement of the petition. We find that the evidence so far placed before the court does not establish this.

The only other ground of the respondent company to support its application for an injunction is to be found in its effort to show that it is solvent. It produced the balance sheet, the trading, contract, profit and loss account, a list of debtors and the amounts of their debts, and a list of creditors and the amounts due from them. All of these documents show the positions as at 30 November 1986 and on the basis of these documents it was contended that the balance after the amount of debts owing to the respondent company is reduced by the debts owed by it was $451,690.15 in favour of the respondent company. In our judgment this matter, if relevant at all, is a matter properly to be considered at the hearing of the petition, and it is premature to consider it at this stage. The Companies (Winding Up) Rules 1972 require that every petition shall be advertised, and in our opinion it is immaterial whether the effect of such advertisement in a particular case would result in damage being caused to the company proposed for winding up. If the advertisement would in fact cause such damage, this is not a ground to prevent a *bona fide* petitioner from advertising.

We order that the injunction be set aside. The appeal is allowed with costs here and in the High Court. The deposit should be refunded to the appellant.

Appeal allowed.

Solicitors: *Ong Ban Chai & Co.; L.M. Ong & Co.*

LIAN KEOW SDN. BHD. (IN LIQUIDATION) & ANOR. v. OVERSEAS CREDIT FINANCE (M) SDN. BHD. & ORS.

[S.C. (Seah, Hashim Yeop A. Sani & Syed Agil Barakbah S.C.JJ.) 30 November, 1, 2, 3, 4, 7, 8 & 9 December 1987 & 7 May 1988]

[Kuala Lumpur — Supreme Court Civil Appeal No. 58 of 1986]

Companies and Corporations — Winding up — Transfers, charges and sales of land before and after commencement of winding up — Whether transfers void — Whether transfers can be validated — Claim against company director for breach of fiduciary duty — Companies Act 1965, ss. 108, 223, 229 & 293.

Companies and Corporations — "Created" — "Property" — Meanings of — Companies Act 1965, ss. 108(1) & 293(1).

Bankruptcy — Transfers, charges and sales of land before and after commencement of winding up of company — Validity of transactions — Whether bankruptcy rules as to fraudulent preference apply to winding up of company — Whether transfers void — Whether transfers can be validated — Claim by liquidator — Bankruptcy Act 1967, ss. 53 & 53B.

Bankruptcy — "Property" — "Any person" — "A person unable to pay his debts as they became due from his own money" — "Within six months after the making of the transfers" — "In favour of any creditor" — Meanings of — Bankruptcy Act 1967, s. 53(1).

Land Law — Transfers, charges and sales of land before and after commencement of winding up of company — Whether transactions valid — Transfers registered — Whether transfers can be set aside — Application of equitable principles — Whether equitable doctrine of constructive fraud applicable — National Land Code 1965, ss. 206, 320 & 342.

In this case, the first appellant (the first plaintiff in the trial court) is a local company limited by shares and is in liquidation. Upon a petition by the Government of Malaysia presented on 13 November 1978, the appellant company was ordered to be wound up under the provisions of the Companies Act 1965. The Official Receiver, the second appellant, was constituted provisional liquidator of the affairs of the company. The case concerned three portions of a piece of rubber estate measuring a total of 893 acres

owned by the first appellant. The first respondent (the first defendant in the trial court) was and is a licensed finance company controlled by Amos William Dawe of the Mosbert group of companies from December 1972 to October 1979. Mosbert Berhad was wound up in 1977. The second respondent (the second defendant in the trial court), Sungei Perling Holdings Sdn. Bhd., was incorporated in Malaysia on 9 May 1979 and its directors were one Gwei Wang Kiat and his wife. The third respondent (the third defendant in the trial court) is Yap Fui Chong, the main shareholder of the first appellant. The central figure in the case was Dawe who controlled the first appellant when the third respondent agreed to sell the whole of the share capital of the first respondent to Dawe on 6 December 1972. On 12 December 1972, the third respondent (on the direction of Dawe) caused the first respondent to execute a charge of the first portion (503 acres) of the estate in favour of the first respondent to secure a loan of $2,500,000 with interest. This loan was paid by the first respondent to Syarikat Ng Kong Yean. On 27 February 1973, the third respondent (on the direction of Dawe) caused the first appellant to execute a transfer of the second portion (87 acres) of the estate to Chelliah Paramjothy (the fourth defendant at the trial) for $174,000 although no money was in fact paid or intended to be paid.

On 17 March 1973, the third respondent (on the direction of Dawe) caused the first appellant to execute a transfer of the third portion (303 acres) of the estate to one Wong Peng Fun, who executed a deed of trust. No money was paid or intended to be paid by Wong. On 15 December 1975, Wong executed a charge of the third portion in favour of the first respondent. On 28 December 1975, Chelliah Paramjothy (the fourth defendant) executed a charge in respect of the second portion of the estate in favour of the first respondent.

On 21 November 1978 the transfer of the first portion of the estate from the first appellant to the first respondent was presented and eventually registered. The transfer by Chelliah Paramjothy of the second portion to the first respondent on 30 November 1978 was registered; and the transfer of the third portion by Wong to the first respondent was also registered with effect from that date. By an agreement dated 19 March 1979, the first respondent agreed to sell the whole estate to Gwei for some $5 million. By an agreement dated 6 July 1979 between Gwei and one Low Eng Heng (acting on behalf of the third defendant), Gwei agreed to sell to Low or his nominee the whole of the estate for some $10 million. Eventually, the second respondent sold the whole of the estate to the first respondent and the full purchase money had been paid or retained when the agreement was completed on 29 November 1979. On 12 April 1980, the Official Receiver, as liquidator, commenced the proceedings. The appellants sought declarations that the transactions consisting of the charges, transfers and sales of the rubber estate belonging to the first appellant which were executed before or after the presentation of the petition for winding up of the first appellant were null and void.

At the trial, several issues were substantially agreed and framed by learned counsel for the parties and the learned judge gave his judgment according to the issues raised – see [1987] 1 M.L.J. 56. The learned trial judge dismissed the appellants' claims against the first, second and fifth defendants but granted their claim against the fourth defendant.

The appellants appealed and in this appeal, the Supreme Court stated that the issues were:

(a) Whether, at all material times before November 1978, the second and third portions of the estate were held by the registered owners upon trust for the first plaintiff.

(b) Whether the transfers of the first, second and third portions of the estate to the first defendant were void by reason of (i) section 53 of the Bankruptcy Act 1967 (as amended) or (ii) section 223 of the Companies Act 1965.

(c) Whether the second plaintiff is entitled, pursuant to section 53B of the Bankruptcy Act 1967 (as amended), to recover:

(i) from the first defendant the proceeds of the sale to the second defendant in March 1979;

(ii) from the second defendant the proceeds of the sale to the third defendant in July 1979.

(d) Whether the transfers of the first, second and third portions of the estate to the first defendant ought to be set aside in equity.

(e) Whether the second defendant became a constructive trustee for the first plaintiff of the whole estate and the proceeds of sale.

(f) Whether any, and if so what, monies are now owing to the first defendant secured on all or any of the proceeds of sale of the estate.

(g) Whether the first plaintiff is entitled to recover damages for (i) breach of trust from the fourth defendant and (ii) for breach of duty from the fifth defendant.

Held, allowing the appeal: (1) the learned trial judge was correct in his finding on the first issue that the registered owners of the second and third portions of the estate held the properties upon trust for the first appellant at all material times before November 1978;

(2) the bankruptcy rules as to fraudulent preference are applied to the winding up of a company by the court by virtue of section 293(1) of the Companies Act 1965. In this case, the first appellant company was ordered to be wound up by the court on a petition presented before the end of the six months after the making of the fraudulent preferential transfers to the first respondent. It followed that the transfers of the first, second and third portions of the estate to the first respondent were therefore void as against the second appellant by reason of section 53(1) of the Bankruptcy Act 1967 (as amended) read with section 293(1) of the Companies Act 1965;

(3) the learned judge was right in holding that all three dispositions were void under section 223 of the Companies Act 1965. The court should in this respect adopt the practice of the courts in England that no validation order would be made if the transfer was proved to be a fraudulent preference and therefore void as against the Official Assignee under section 53(1) of the Bankruptcy Act 1967. The validation order made by the learned judge pursuant to section 223 of the Companies Act 1965 should be set aside;

(4) since the transfers were fraudulent preferences and therefore void as against the second appellant under section

53(1) of the Bankruptcy Act 1967 read together with section 293(1) of the Companies Act 1965, the findings of the learned judge on the third issue must be set aside. An order should be made that:

(a) the first respondent is to pay to the second appellant the sum of $2,036,090 within 30 days from the date of the judgment; and

(b) the second respondent is to pay to the second appellant the sum of $3,009,062.13 within 30 days from the date of the judgment;

(5) where there is in existence a right *in personam* or an equitable right prior to the registration of title to land, the equitable principles of remedies may be applied. However, upon registration of the transfer of the said land to the purchaser who thereby obtains a right *in rem* or a real right in the property, the express provisions of the National Land Code 1965 will apply to the exclusion of equitable principles. The equitable doctrine of equitable fraud has no application under the provisions of the Code;

(6) the transfers of the first, second and third portions of the estate to the first respondent can therefore only be set aside pursuant to section 340(2) of the National Land Code 1965;

(7) the issue as to whether the second respondent became a constructive trustee for the first appellant of the whole estate and the proceeds of sale had been abandoned and the appellants were therefore not allowed to reframe the issue and argue it in the appeal;

(8) the first appellant company is still owing the first respondent the amount of monies adjudged in Originating Summons No. 83 of 1975 now secured on the proceeds of sale of the first portion of the estate only;

(9) the third respondent (Yap) is liable for breach of fiduciary duty and the first appellant company is entitled to claim damages against him for breach of fiduciary duty as director of the first appellant company.

[*Editorial Note:* The Supreme Court on 2 June 1988 also ordered that the sum of $4,636,800 plus accrued interest be paid to Overseas Credit Finance (M) Sdn. Bhd. and a "certificate for two counsel here and below" be issued to the appellants.]

Cases referred to:

(1) *Willmott* v. *London Celluloid Co.* (1886) 31 Ch. D. 425 (consd).
(2) *Rengasamy Pillai* v. *Comptroller of Income Tax* [1970] 1 M.L.J. 233 (folld).
(3) *In Re Chong Khian (Bankrupt)* Kuching High Court No. K45 of 1978 (folld).
(4) *Bank of Australasia* v. *Hall* (1907) 4 C.L.R. 1514 (refd).
(5) *Rees* v. *Bank of New South Wales* (1963-64) 111 C.L.R. 210 (refd).
(6) *In Re Wiltshire Iron Company* (1868) 3 Ch. App. 443 (consd).
(7) *In Re Steane's (Bournemouth) Ltd.* [1950] 1 All E.R. 21 (consd).
(8) *Re J. Leslie Engineers Co. Ltd.* [1976] 2 All E.R. 85 (refd).
(9) *Belmont Finance Corporation* v. *Williams Furniture Ltd. & Ors. (No. 2)* [1980] 1 All E.R. 393 (folld).
(10) *Than Kok Leong* v. *Low Kim Hai* [1983] 1 M.L.J. 187 (refd).
(11) *Bagher Singh* v. *Chanan Singh & Anor.* [1961] M.L.J. 328 (refd).
(12) *Wilkins & Ors.* v. *Kannammal & Ors.* [1951] M.L.J. 99, 100 (cited).
(13) *Registrar of Titles, Johore* v. *Temenggong Securities Ltd.* [1976] 2 M.L.J. 44, 45 (cited).
(14) *Oh Hiam & Ors.* v. *Tham Kong* [1980] 2 M.L.J. 159, 164-165 (cited).
(15) *Bachan Singh* v. *Mahinder Kaur & Ors.* [1956] M.L.J. 97 (cited).
(16) *Abigail* v. *Lapin* [1934] A.C. 491 (cited).
(17) *Ong Chat Pang & Anor.* v. *Valliappa Chettiar* [1971] 1 M.L.J. 224 (cited).
(18) *Waimiha Sawmilling Co. Ltd.* v. *Waione Timber Co. Ltd.* [1926] A.C. 101 (refd).
(19) *Assets Co. Ltd.* v. *Mere Roihi* [1905] A.C. 176 (refd).
(20) *Mohamed Isa* v. *Haji Ibrahim* [1968] 1 M.L.J. 186 (cited).

SUPREME COURT.

John Chadwick Q.C. (*T. Thomas* and *Hor Paw Yu (Miss)* with him) for the appellants.

D.K. Rattee Q.C. (*R.R. Sethu* with him) for the first respondent.

Upali Masacorale (*Robert Lai* with him) for the second and third respondents.

Cur. Adv. Vult.

Seah S.C.J.: In the court below, the suit was fought by the parties deliberately upon several issues substantially agreed to and framed by learned counsel and the learned judge gave his judgment according to the issues raised. This appeal ought, in my opinion, to be decided on that footing.

The relevant facts pertaining to this appeal have been summarized by the learned judge in his judgment reported in [1987] 1 M.L.J. 56 at pp. 58-61 and there is no need to reproduce them here.

The first issue A reads:

> Whether, at all material times before November 1978, the second and third portions of the estate were held by the registered owners upon trust for the first plaintiff.

For convenience, the estate of the first appellant company (first plaintiff in the court below) can be divided into: (a) first portion, (b) second portion and (c) third portion. It was common ground that the first portion was registered in the name of the first appellant, the second portion in the name of

Chelliah Paramjothy and the third portion in the name of Wong Peng Fun. The findings of the learned judge are that "the registered owners of the second and third portions of the estate held the properties upon trust for the first plaintiff at all material times before November 1978". In my judgment, there was ample incontrovertible documentary evidence produced at the trial to support these findings and I am in complete agreement with the learned trial judge on issue A.

Issue B is:

> Whether the transfers of the first, second and third portions of the estate to the first defendant are void by reason of:
>
> (i) section 53 of the Bankruptcy Act 1967 (as amended) or
>
> (ii) section 223 of the Companies Act 1965.

The findings of the learned judge are that the transfers are:

(a) not void by reason of section 53(1) of the 1967 Act but

(b) void for the purpose of section 223 of the 1965 Act.

The first defendant is the first respondent, Overseas Credit Finance (M) Bhd., and the second respondent is Sungei Perling Holdings Sdn. Bhd. in the present appeal.

In my opinion, section 53 of the Bankruptcy Act 1967 (as amended) is imported into a winding up proceeding of a company by section 293(1) of the Companies Act 1965 which provides, *inter alia*, that:

> "Any transfer ... or other act relating to property made or done by ... a company which, if it had been made or done by ... an individual, would in his bankruptcy under the law of bankruptcy be void or voidable shall in the event of the company being wound up be void or voidable in like manner."

In short, the rules of bankruptcy as to fraudulent preference are applied to the winding up of the company by the court by section 293(1) of the Companies Act 1965.

I think it appropriate at this stage to refer to what Bacon V.C. said about this subject. Speaking of section 164 of the English Companies Act 1862 which is the forerunner of section 320 of the English Companies Act 1948 (ours is section 293 of the Companies Act 1965) in the case of *Willmott* v. *London Celluloid Co.*[1] Bacon V.C. said (at p. 434):

> "The 164th section, however, relates only to a case similar in all respects to that which would arise in bankruptcy, and the very words of the 164th section put this beyond the possibility of doubt. This Act of Parliament, dealing as it does with an insolvent company, that is, a bankrupt company, and making provision for the benefit of the creditors, of the shareholders, and of all other persons interested, declares by the 164th section that a fraudulent preference shall be set aside and held to be void for the benefit of the creditors – that is, the creditors in the winding up. No other persons have any right to raise the question of fraudulent preference..."

Earlier on, Bacon V.C. observed that:

> "In bankruptcy, and only in bankruptcy as far as I know, the doctrine of fraudulent preference found a place in the jurisprudence of this country. A winding up is, in point of fact, a bankruptcy, and the doctrine is also applicable to a winding up."

Section 164 puts the law of fraudulent preference in the case of an insolvent company on the same footing as in an ordinary bankruptcy and is therefore intended only for the protection of the general body of creditors.

It was the submission of learned counsel for the first and second respondents that section 293 of the Companies Act 1965 did not and could not apply to the facts of this case because: (a) the second and third portions of the estate were registered in the names of Chelliah Paramjothy (second portion) and Wong Peng Fun (third portion) and (b) the two transfers were not executed by the first appellant company.

Before dealing with this submission, I think I ought to remind myself that the jurisdiction in bankruptcy is an equitable jurisdiction. From the origin of the bankruptcy law – from the first statute that was passed in England – the working out of the statutes has generally, if not, universally, been committed to the Court of Chancery, and for centuries equitable principles have been interwoven into the administration of the law of bankruptcy. A good deal of the confusion, if there be any, which has arisen was brought about by courts of common law fastening upon common law doctrines and applying them to the strict construction of Acts of Parliament, so that it does unfortunately happen that decisions of the common law founded upon common law doctrines have been permitted to prevail in the administration of bankruptcy.

That seems to be the position in England and I would respectfully adopt it in Malaysia since our Bankruptcy Act 1967 has been modelled along the British Bankruptcy Act 1914 (see *Rengasamy Pillai* v. *Comptroller of Income Tax*[2] at p. 234). In my opinion, the same rule should apply to the winding up of a company. I would now consider the preliminary objections of the first and second respondents relating to the applicability of section 293(1) of the Companies Act 1965.

In my judgment, the word "property" used in section 293(1) must of necessity means the "property of the company" and for present purposes, I am only concerned with the landed property of the company, *viz.* the second and third portions of the estate. Under the National Land Code 1965, the landed property of the company simply means (a) the registered interest (legal) and/or (b) the beneficial interest (equitable). Here, the learned judge had already held that although Paramjothy was the registered owner of the second portion and Wong Peng Fun the registered proprietor of the third portion, both Paramjothy and Wong Peng Fun were at the material times holding the second and third portions of the estate on trust for the first appellant company. In other words, the beneficial interest of both the second and third portions of the estate was vested in the first appellant company. True, the second and third portions of the estate were transferred to the first respondent by Paramjothy (second portion) and Wong Peng Fun (third portion) and not by the first appellant company. In my opinion, it was not necessary that the transfers of the property of the company should be actually executed by the company; it would be sufficient compliance with the provision of section 293(1) if they were signed by persons in fiduciary capacities, like trustees, on behalf of the company. The objections of learned counsel for the first and second respondents therefore fail.

Next, I would deal with section 53(1) of the Bankruptcy Act 1967 (as amended). The relevant part of subsection (1) of section 53 reads as follows:

> "Every ... transfer of property ... made ... by any person unable to pay his debts, as they become due, from his own money in favour of any creditor ... shall be deemed to have given such creditor a preference over other creditors if the person making ... the same is adjudged bankrupt on a bankruptcy petition presented within six months after the date of making ... the same and every such act shall be deemed fraudulent and void as against the Official Assignee."

In short, section 53(1) renders void as against the Official Assignee a transfer of property, by a person who is unable to pay his debts as they become due from his own money, in favour of a creditor as this transfer shall be deemed as giving that creditor a fraudulent preference over the other creditors if that person is adjudged a bankrupt within six months after the making of the transfers.

With regard to the word "property" used in section 53(1) of the Bankruptcy Act 1967 (as amended), see the definition of "property" contained in section 2 of the Act and I would give it the same meaning and for the like reasons which I have construed the word "property" in section 293(1) of the Companies Act 1965 in relation to the second and third portions of the estate which were registered in the names of Chelliah Paramjothy (second portion) and Wong Peng Fun (third portion) at the times of the transfers to the first respondent.

As regards the phrase "every transfer of property made by any person" used in section 53(1), I think these words "any person" ought to be given a liberal interpretation. In my opinion, the transfer of the property may be signed by the bankrupt as well as by his trustee or agent on his behalf provided always that the beneficial interest in the property is vested in the bankrupt at the material time. Otherwise, the bankrupt could easily defeat the just claims of the Official Assignee by registering his property in the name of a third party.

For the above reasons, I am of the opinion that the bankruptcy rules as to fraudulent preference apply by virtue of section 293(1) of the Companies Act 1965 but the question which I still have to determine is whether the second appellant had succeeded in proving to the satisfaction of this court that the transfers of the first, second and third portions of the estate to the first respondent were void as against the Official Liquidator by reason of section 53(1) of the Bankruptcy Act 1967 (as amended).

It seems that the second appellant was relying on the following facts to establish that the first appellant company was unable to pay its debts, as they became due, from its own money, when the fraudulent preferential transfers of the first, second and third portions of the estate were made to the first respondent, *viz*:

(a) On 23 December 1972 the first appellant company charged the first portion to the first respondent to secure a loan of $2,500,000. Later, the second and third portions were charged to the first respondent by Paramjothy and Wong Peng Fun as additional security. All these three charges were registered under the National Land Code 1965.

(b) On 25 May 1975 the first respondent made a statutory demand for the repayment of the loan and interest accrued and when the first appellant company defaulted, legal proceedings were taken *vide* Originating Summons No. 83/75 and an order for sale by public auction was made by the High Court on 13 April 1976. It was alleged that the total sum due and payable by the first appellant company to the first respondent as at 5 April 1976 was $3,453,258.52. When the charged properties were put up for public auctions on 29 November 1976 there was no bid.

(c) On 16 March 1977 the Government of Malaysia obtained judgment against the first appellant company for the sum of $221,386.93. A statutory demand pursuant to section 218(a) of the Companies Act 1965 was served on the first appellant company on 14 December 1977 and when there was no payment after the expiration of the prescribed period, a petition to wind up the first appellant company was presented to the Johore Baru High Court on 13 November 1978. An order to wind up the company was made on 11 March 1979.

The meaning of the words "a person unable to pay his debts as they became due from his own money" in section 53(1) of the Bankruptcy Act 1967 (as amended) was considered by me in the unreported case of *In Re Chong Khian (Bankrupt).*[3]

After referring to some passages in the Australian cases of *Bank of Australasia* v. *Hall*[4] (at pp. 1528 and 1543) and *Rees* v. *Bank of New South Wales*[5] (at pp. 218 and 230) I held that the question whether a debtor was insolvent at a particular time was a question of fact. I also made the following observations:

"The question is not whether the debtor would be able, if time were given to him, to pay his debts out of his assets, but whether he is presently able to do so with moneys actually available..."

and

"If ... the debtor's position is such that he has property ... which if realized would produce sufficient money to pay all his indebtedness, and if that property is in such a position as to title and otherwise that it could be realized in time to meet the indebtedness as the claims mature ... he cannot be said to be unable to pay his debts as they become due from his own moneys ..."

In short, the question is not whether the debtor's assets exceed his liabilities as appeared in the books of the debtor, but whether there are moneys presently available to the debtor, or which he is able to realize in time, to meet the debts as they become due. It is not sufficient that the assets might be realizable at some future date after the debts have become due and payable.

Applying this test to the facts of this case, I am satisfied that the second appellant had produced ample evidence to prove that the first appellant company was unable to pay its debts as they became due from its own money available at that point of time when the first, second and third portions of the estate were transferred to the first respondent. In my judgment, the second appellant had established on incontrovertible evidence that these transfers were presumed to be fraudulent preferences over other creditors of the first appellant company. In my opinion, the presumption that these transactions amounted to fraudulent preferences over the other creditors of the first appellant company had not been rebutted by the first respondent. Nor did the second respondent make any attempt to adduce evidence to discharge this rebuttable presumption.

For ease of reference, I append hereunder the relevant dates relating to the fraudulent preferential transfers to the first respondent:

Transferor	*Date of execution*	*Date of registration*
First portion by first appellant company	4 November 1978	21 November 1978
Second portion by Paramjothy	September 1978	30 November 1978
Third portion by Wong Peng Fun	23 September 1978	30 November 1978
Date of presentation of the winding up petition:		13 November 1978
Date of winding up order of first appellant company:		11 March 1979

In *Re Chong Khian (Bankrupt)*[3] I held that the date of making of the fraudulent preference in favour of a creditor over other creditors under section 53(1) of the Bankruptcy Act 1967 (as amended) means the date of the registration of the said transfer at the Land Registry office. It is correct to point out that I was construing a provision of the Sarawak Land Code in that case. However, since the Sarawak Land Code and the National Land Code 1965 are substantially based on the Torrens system of Australia, I would adopt the same construction in construing the National Land Code 1965 in Peninsular Malaysia. Applying this rule of interpretation, it followed that all the three transfers of the first, second and third portions of the estate to the first respondent were made in November 1978. In other words, transfer of landed property was made when registered under the National Land Code 1965 and not when it was executed by the parties.

Lastly, I have to consider the meaning to be given to the expression "within six months after the making of the transfers" in section 53(1) of the Bankruptcy Act 1967 (as amended). It is pertinent to note that all the three fraudulent preferential transfers were made after the filing of the petition to wind up the first appellant company on 13 November 1978 and the question is whether section 53(1) can have any application to the transfer made after the presentation of the petition. Learned counsel for the first respondent had contended that subsection (1) did not and could not apply in such a case but learned counsel for the second appellant disputed this. In my opinion, the expression "within six months after the date of making (the transfers)" in section 53(1) is capable of being construed to mean: (a) *before the expiration of six months* after the date of making the transfers or (b) *during the period of six months* after the date of making the transfers.

I would prefer construction (a) which would have the effect of preventing any mischief which a bankrupt might be thinking of doing between the period of the presentation of the bankruptcy petition and the making of the adjudication order by the court.

I agree with the contention of learned counsel for the second appellant that the words "in favour of any creditor" means "in favour of any person claiming to be a creditor". There can be no doubt that the first respondent was at the material time claiming to be a creditor when the transfers of the first, second and third portions of the estate were made.

Now, applying this rule of interpretation to the facts of this case, I agree with the contention of the second appellant that the first appellant company was ordered to be wound up by the court on a petition presented before the end of six months after the making of these fraudulent preferential transfers to the first respondent. It followed that the said transfers of the first, second and third portions of the estate to the first respondent were therefore void as against the second appellant by reason of section 53(1) of the Bankruptcy Act 1967 (as amended) read with section 293(1) of the Companies Act 1965.

For the above reasons, I disagreed with the learned judge and would answer issue B(i) in the affirmative.

I would consider issue B(ii) relating to section 223 of the Companies Act 1965 which reads:

> "Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the court shall, unless the court otherwise orders, be void."

The learned judge held (correctly in my view) that the transfers of the first, second and third portions of the estate to the first respondent were void by reason of section 223 of the Companies Act 1965 but he, however, in the exercise of his discretion, validated them. Learned counsel for the second appellant had submitted that the learned judge was wrong to validate these said transfers and that he had exercised his discretion on wrong principles. For the first respondent, learned counsel now concedes that these three dispositions were made at the time of registration at the Land Registry office and since all three of them were registered after the presentation of the winding up petition by the court on 13 November 1978 they were therefore void under section 223 of the Companies Act 1965. However, it was the submission of learned counsel for the first respondent that the learned judge had exercised his discretion judicially in validating the said transfers and in the absence of evidence that the discretion had not been made properly this court ought not to disturb it. Alternatively, learned counsel contended that if this court should hold that the learned judge erred in validating the said transfers without imposing any conditions, then the first respondent would not object to any validation order made by this court subject to the first respondent accounting for any surplus of the purchase price of $5,070,000 after satisfying the three registered charges made in favour of the first respondent.

Before considering these rival submissions, I like to state that the corresponding section in the English Companies Act 1948 is section 227. In *re Wiltshire Iron Company,*[6] Lord Cairns L.J., speaking of the general purpose of section 153 (the forerunner of section 227) of the English Companies Act 1862, said at p. 446:

"The 153rd section no doubt provides that all dispositions of the property and effects of the company made between the commencement of the winding up (that is the presentation of the petition) and the order for winding up shall, unless the court otherwise orders, be void. This is a wholesome and necessary provision to prevent, during the period which must elapse before a petition can be heard, the improper alienation and dissipation of the property of a company *in extremis.* But where a company actually trading, which it is in the interest of everyone to preserve, and ultimately to sell, as a going concern, is made the object of a winding up petition, which may fail or may succeed, if it were to be supposed that transactions in the ordinary course of its current trade, *bona fide* entered into and completed, would be avoided, and would not, in the discretion given to the court, be maintained, the result would be that the presentation of a petition, groundless or well-founded, would, *ipso facto,* paralyse the trade of the company, and great injury, without any counterbalance of advantage, would be done to those interested in the assets of the company."

Dealing with the phrase "unless the court otherwise orders" in section 227 of the Companies Act 1948 in *In Re Steane's (Bournemouth) Ltd.*[7] Vaisey J. said (at p. 25):

"The legislature, by omitting to indicate any particular principles which should govern the exercise of the discretion vested in the court, must be deemed to have left it entirely at large, and controlled only by the general principles which apply to every kind of judicial discretion."

The learned judge continued "that each case must be dealt with on its own facts and particular circumstances (special regard being had to the question of the good faith and honest intention of the persons concerned), and that the court is free to act according to the judge's opinion of what would be just and fair in each case".

When the learned judge exercised the discretionary power contained in section 223 of the Companies Act 1965 to validate the dispositions made after the commencement of the winding up proceeding, he appeared to have done so on the footing that section 53(1) of the Bankruptcy Act 1967 (as amended) read with section 293(1) of the Companies Act 1965 did not apply. I disagreed with the learned judge on this and I have answered that the transfers of the first, second and third portions of the estate to the first respondent were fraudulent preferences and therefore void as against the second appellant. Unlike section 223 of the 1965 Act, the court has no power to make any validation order under section 53 of the 1967 Act. It seems to be the practice of the courts in England that when a transfer had been held to be a fraudulent preference and therefore void as against the Official Assignee under section 44(1) of the English Bankruptcy Act 1914 the court would be reluctant to exercise its discretionary power contained in section 227 of the English Companies Act 1948 and validate the void transfer because to do so would prejudice the right of the body of general creditors of the insolvent company.

I have given careful consideration to the submissions of learned counsel for the second appellant as well as the first respondent and I have also taken into account the facts of this case. In my judgment, I should adopt the practice of the courts in England that no validation order would be made if the transfer was proved to be a fraudulent preference and therefore void as against the Official Assignee under section 53(1) of the Bankruptcy Act 1967 (as amended). For the above reasons, I set aside the validation order made by the learned judge pursuant to section 223 of the Companies Act 1965.

Issue C reads:

> Whether the second plaintiff is entitled, pursuant to section 53B of the Bankruptcy Act 1967 (as amended) to recover:
>
> (i) from the first defendant the proceeds of the sale to the second defendant in March 1978;
>
> (ii) from the second defendant the proceeds of sale to the third defendant in July 1979?

The findings of the learned judge on this issue are that section 53B did not apply to the proceeds of sale in view that the transfers of the first, second and third portions of the estate to the first defendant were not avoided by section 53(1) of the Bankruptcy Act 1967 (as amended) in the result that the second plaintiff is not entitled to recover (i) and/or (ii).

Since I have already held that these transfers were fraudulent preferences and therefore void as against the second appellant under section 53(1) of the Bankruptcy Act 1967 (as amended) read with section 293(1) of the Companies Act 1965, I set aside the finding of the learned judge.

In my opinion, reference in section 293(1) to the law of bankruptcy under which a transfer would be void is, or includes, a reference to the provision for the avoidance of a fraudulent preference contained in section 53(1). And the phrase "the law of bankruptcy" should be construed as a reference to the relevant provision of the Bankruptcy Act 1967 which may be amended and/or extended from time to time by Parliament (see section 35(1) of the Interpretation Act 1967). It was the submission of learned counsel for the second appellant that section 53B of the Bankruptcy Act 1967 (as amended) is made applicable by section 293(1) of the Companies Act 1965 by virtue of the words "in like manner" in that subsection. Like the learned judge, I accept the submission that the words "in like manner" in section 293(1) of the Companies Act 1965 means "with like consequences" or "with like effects".

I would like to point out sections 53A, 53B and 53C of the Bankruptcy Act 1967 (as amended) which lay down the procedure and law to be followed after a transfer has been proved to be a fraudulent preference and therefore void as against the Official Assignee under section 53(1) are not to be found in section 44 of the English Bankruptcy Act 1914 or corresponding section of the Australian Bankruptcy Act. Whereas in Malaysia the remedy available to the Official Assignee is regulated by the 1967 Act, the position in England and in Australia appears to be determined by the general law (see *Re J. Leslie Engineers Co. Ltd.*[8] at p. 90 between lines C and D). Since this case involves the winding up of a company by the court the right of the Official Assignee is subrogated by the second appellant.

On the facts of this case, the second appellant had established to the satisfaction of this court that the first respondent is a person who "has acquired property of the bankrupt (first appellant company) under a transaction that is void" and had sold the said property to the second respondent in March 1979 for the sum of $5,152,000 with the consequence that the proceeds from such sale "shall be deemed to be the property" of the second appellant under section 53B(1) of the Bankruptcy Act 1967 (as amended).

Similarly, I am satisfied that the second appellant had proved that the second respondent is the person "to whom the person (first respondent) may have resold or transferred the said property" (see section 53B(2)) and lastly, in my judgment, Perusahaan Pelangi Sdn. Bhd. (the third defendant in the court below) is the person "to whom the second respondent had resold or transferred the said property" (see section 53B(2)).

Now, section 53B(3) affords a defence to the second respondent if it can be shown that the property was acquired from the first respondent for valuable consideration and in good faith. The onus of proving this rested on the second respondent and the learned judge ruled, on the evidence produced before him, that the second respondent had failed to discharge it. There was no cross-appeal by the second respondent against this finding of the learned judge and, in my opinion, there was ample evidence to support it. Section 53B(2) reads:

> "The Official Assignee may recover the property referred to in subsection (1) or its value or the money or other proceeds therefrom from the person who acquired it from the bankrupt or from any other person to whom the person may have sold, resold or transferred the property or paid over the money or other proceeds therefrom as fully and effectually as the Official Assignee could have recovered the property if it has not been so sold, transferred, disposed of, realized or collected."

I am not concerned with the first limb of the subsection because the first respondent had sold the first, second and third portions of the estate of the first appellant company to the second respondent for the stated consideration of $5,152,000 in March 1979. In July 1979, the second respondent resold the said property to Perusahaan Pelangi Sdn. Bhd. for the sum of $9,977,903.13 and the second appellant had abandoned legal proceedings against Pelangi and I assume that the second appellant now accepted that Pelangi had paid a fair market price for the said property and had acted in good faith. The crux of the question I have to decide in this appeal is whether the second appellant can legally recover both the sums of (a) $5,152,000 or any other sum from the first respondent and (b) $9,977,903.13 or any other sum from the second respondent. Before dealing with this question, I think I ought at this stage to consider issue F which reads:

> Whether any, and if so what, monies are now owing to the first defendant secured on all or any of the proceeds of sale of the estate.

Without making any final determination of the matters, I would append hereunder the undermentioned relevant facts:

(i) On 23 December 1972, the first appellant company charged the first portion of the estate to the first respondent to secure a loan of $2,500,000. This charge was duly registered

under the National Land Code 1965 and the Companies Act 1965. Later, the second and third portions of the estate were charged to the first respondent as additional security for the loan of $2,500,000. These two charges were registered under the National Land Code 1965 but they were not registered under section 108 of the Companies Act 1965.

(ii) Learned counsel for the second appellant had submitted that the subsequent two charges were void as against the second appellant by reason of section 108(1) of the Companies Act 1965. It was the contention of learned counsel for the first respondent that the provision of section 108 had no application because these two charges were not created by the first appellant. I would defer ruling on these rival submissions to the latter part of this judgment.

I turn now to consider the question whether section 108(1) of the Companies Act 1965 applied to the two charges executed by Paramjothy and Wong Peng Fun as additional security although registered under the National Land Code 1965 but not registered under section 108(1) thereof.

Although Paramjothy was the registered owner of the second portion and Wong Peng Fun the registered proprietor of the third portion of the estate, it was held by the learned judge and this court in answer to issue A that at all material times before November 1978 the second and third portions of the estate were held by the registered owners upon trust for the first appellant company. In short, the beneficial interest in the second and third portions was vested in the first appellant company, and the beneficial interest in the second and third portions of the estate was charged to the first respondent as additional security. In my opinion, a charge which affects the company's beneficial interest in land is a charge under section 108(3)(e) of the Companies Act 1965 and therefore these two charges were, in my judgment, caught by subparagraph (e) of section 108(3).

The next question is whether these two charges were created by the first appellant company. It was the submission of learned counsel for the first respondent that these two charges were signed by Paramjothy (second portion) and Wong Peng Fun (third portion) and therefore they were not created by the first appellant company. Learned counsel wanted this court to construe the words "created by a company" in section 108(1) of the Companies Act 1965 to mean "executed" or "signed" by the company. If the legislature had intended to give the word such a restricted meaning, it would have been easy for Parliament to substitute the word "executed" or "signed" for the word "created". Instead the word "created" is used by the legislature. In my opinion, the word "created" connotes a wider meaning than the word "executed or "signed". To execute means to complete or carry into effect whereas according to *The Concise Oxford Dictionary* "create" means to bring into existence. In my opinion, a distinction ought to be made between the words "create" and "execute". It is quite possible for a charge to be created by a company but the execution of the said charge to be signed by a trustee on behalf of the company. Only charges created by a company over its property need be registered at the Companies Registry. In my opinion, it is not necessary that the charge itself should be executed or signed by the company; it is sufficient if, having regard to the facts, the company could be regarded as having created the charge or the charge was in effect created by the company. In other words, it is not the form of the words used but the substance of the transaction which would be the test to be applied.

Applying this test to the facts of this case, it is plain that the beneficial interests of the first appellant company in the second and third portions of the estate were charged to the first respondent as additional security for the loan of $2,500,000 and interest. Although the two charges were signed by Paramjothy (second portion) and Wong Peng Fun (third portion) and in the light of the answer to issue A abovementioned, the legal effect of these two transactions was that these two charges were in fact and in law created by the first appellant company albeit they were signed by Paramjothy and Wong Peng Fun respectively. I therefore agree with the submission of learned counsel for the second appellant that the words "created by a company" in section 108(1) of the Companies Act 1965 should be construed to include a charge created on behalf of a company. Failure to register these two charges had the effect of making them void as against the second appellant and creditors of the first appellant company and against them only.

I append hereunder the relevant events in chronological order:

(a) On 13 April 1976 the first respondent obtained a court order to sell the first portion of the estate of the first appellant company by public auction to repay the sum of $3,453,258.52 as at 5 April 1976 and other incidental expenses. When the auction took place on 29 November 1976 there was no bid.

(b) In November 1978 the first, second and third portions of the estate were transferred to the first respondent for a stated consideration of $5,070,000 made up as follows:

(i) Price payable for the first portion	$3,115,910
(ii) Price payable for the second and third portions	$1,954,090
	$5,070,000

(c) In March 1979 the first respondent sold the property to the second respondent for the sum of $5,152,000, and

(d) In July 1979, the second respondent resold the property to Perusahaan Pelangi Sdn. Bhd. for $9,977,903.13. It was not in dispute that $9,977,903.13 was paid out in the manner following:

(i) Payable to the first respondent in discharge of loan under agreement of 19 March 1979	$4,636,800
(ii) Retained by solicitors for payment of real property gains tax by the second respondent	$ 463,680
(iii) Retained by solicitors for payment of real property gains tax by Perusahaan Pelangi Sdn. Bhd.	$1,930,361
	$7,030,841
(iv) Balance payable to the second respondent	$2,947,062.13
	$9,977,903.13

The sum of $4,636,800 is presently retained by the solicitors in their client's account, awaiting the outcome of this appeal.

The learned judge answered issue F in the following words:

"The first plaintiff is still owing the first defendant the amount of monies adjudged in Originating Summons No. 83/1975 now secured on the proceeds of sale of the estate."

Having regard to the finding of this court that the two charges executed by Paramjothy (second portion) and Wong Peng Fun (third portion) purporting to secure the second and third portions of the estate as additional security for the loan of $2,500,000 and interest were void as against the second appellant and the creditors of the first appellant, the decision of the learned judge ought to be varied by deleting the words "of the estate" and substitute the following words: "of the first portion of the estate only"

The sum adjudged to be owing by the first appellant company to the first respondent on 13 April 1976 was $3,453,258.52 whereas the proceeds from the sale of the first portion of the estate by the first appellant company to the first respondent was stated to be $3,115,910. There was a deficit of $337,348.52.

It was not in dispute that the first appellant company purported to sell the first, second and third portions of the estate to the first respondent for the sum of $5,070,000 and the first respondent purported to re-sell all the three portions of the estate to the second respondent for the sum of $5,152,000. Since the first respondent had obtained a court order on 13 April 1976 to sell the first portion of the estate by public auction and as this said order had not been set aside by a court of competent jurisdiction, I think it is right and proper for the first respondent to deduct only $4,115,910 (being the proceeds of sale of the first portion of the estate) from the total purchase price of $5,152,000. From this transaction, I order the first respondent to pay to the second appellant the sum of $2,036,090 ($5,152,000 less $3,115,910) within 30 days from the date of this judgment.

With regard to the claim against the second respondent in respect of the transaction with Perusahaan Pelangi Sdn. Bhd., I find that the second respondent had failed in all their defences. Since it has been mutually agreed that the sum payable was $2,947,062.13, I therefore order the agreed sum be paid by the second respondent to the second appellant within 30 days from the date of this judgment.

Issues D and E are considered and dealt with by my learned brother, Y.A. Tan Sri Syed Agil Barakbah and issue G by my learned brother, Y.A. Tan Sri Hashim Yeop A. Sani. I have had the advantage of reading the judgments prepared by my learned brethen which I agree and there is nothing which I can usefully add.

To summarize, the answers of this court to the various issues are as follows:

Issue A:

I agree with the finding of the learned judge and would answer this question in the affirmative.

Issue B:

I disagree with the learned judge on question (i) and our findings were that the transfers of the first, second and third portions of the estate to the first respondent, Overseas Credit Finance (M) Bhd., were void by reason of section 53(1) of the Bankruptcy Act 1967 (as amended). I agree with the learned judge that all the three dispositions to the first respondent were void under section 223 of the Companies Act 1965.

Issue C:

I set aside the findings of the learned judge and order:

(a) the first respondent, Overseas Credit Finance (M) Bhd., to pay to the second appellant the sum of $2,036,090 within 30 days from the date of this judgment; and

(b) the second respondent, Sungei Perling Holdings Sdn. Bhd., to pay to the second appellant the sum of $2,947,062.13 within 30 days from the date of this judgment.

Issue D:

The transfers of the first, second and third portions of the estate to the first respondent can only be set aside pursuant to section 340(2) of the National Land Code 1965.

Issue E:

This issue had been abandoned and the appellants were not allowed to reframe the issue and argue it in this court.

Issue F:

The first appellant company, Lian Keow Sdn. Bhd. (In Liquidation), is still owing the first respondent, Overseas Credit Finance (M) Bhd., the amount of monies adjudged in Originating Summons No. 83 of 1975 now secured on the proceeds of sale of the first portion of the estate only.

Issue G:

The finding of the learned judge was set aside and this court held that the first appellant company is entitled to recover damages against the third respondent, Yap Fui Chong, for breach of fiduciary duty as director of the first appellant company.

For the above reasons as well as for the reasons given by my learned brethen, Y.A. Tan Sri Hashim Yeop A. Sani and Y.A. Tan Sri Syed Agil Barakbah, the appeal is allowed. As regards costs, I would award to the appellants one-half of the taxed costs here and below against the first and second respondents only, inasmuch as most of the court's time was spent in hearing submissions on new issues which have not been agreed to between the parties and which were disallowed to be raised in this court. The appellants, however, are entitled to full costs here and below against the third respondent, Yap Fui Chong.

Before departing from this case, I would like to deal with the finding of the learned judge on Ng Kong Yeam, who apparently appeared as common solicitor for the first appellant company and the first respondent at the material times when the first portion of the estate was charged to the first respondent on 23 December 1972. At p. 69 of his judgment, the learned judge posed this question:

> "The question is whether when Ng Kong Yeam received the monies from OCF (first respondent) and disbursed those monies to Pan Orient, he acted so as solicitor for Overseas Credit Finance or as solicitor for the plaintiff company."

Now, rule 13(a) of the Rules of Practice and Etiquette of the Bar Council (which applied to this case) required a solicitor to keep an account of each of his client and on the evidence adduced, it seemed to me that when Ng maintained such an account in his client's account ledger in the name of Overseas Credit Finance he was merely complying with this practice rule. In short, the appellants had established by documentary evidence that Ng Kong Yeam had received the $2,500,000 from the first respondent and had also entered it in his client's account ledger in the name of the first respondent.

Since it was the contention of the first respondent that Ng Kong Yeam acted as solicitor for the first appellant company when he received the $2,500,000, the onus of proving this rested on the first respondent. Although Ng was called as a witness for the appellants, it seems to me that the main purpose of calling Ng was to ask him to tender the documentary evidence to support the case of the appellants. In my opinion, the burden was then shifted to the first respondent to rebut the

presumption arising under rule 13(a) of the Rules of Practice and Etiquette of the Bar Council. If the $2,500,000 was received by Ng Kong Yeam as solicitor for the first appellant company it was for the first respondent to ask Ng why he placed the monies in the name of Overseas Credit Finance and not in the name of Lian Keow Sdn. Bhd. In my opinion, this question should be put by the first respondent and not by the appellants. The learned judge had, in my opinion, wrongly placed the onus of proof on the appellants. I therefore set aside this finding of the learned judge and I make no final determination on this particular issue preferring it to be adjudicated by a proper forum.

Hashim Yeop A. Sani S.C.J.: I have had the benefit of reading the judgments of my brother judges, Datuk George K.S. Seah S.C.J. and Tan Sri Datuk Syed Agil Barakbah S.C.J., and I agree with the views expressed in those judgments on the issues involved. In this judgment I will only deal with issue G.

Liability of Yap Fui Chong as director

The issue before the learned judge was whether the first plaintiff company was entitled to recover damages for breach of duty from the fourth defendant (now deceased) and the fifth defendant (Yap Fui Chong), now the third respondent. The learned judge held that the plaintiff company was entitled to recover damages from the fourth defendant but not from the fifth defendant.

Basically the claim against Yap Fui Chong was in respect of the charge of the first portion in favour of the first respondent on 23 December 1972. In procuring the execution of the charge, it was contended that Yap acted wrongfully and in breach of his duty as director of the plaintiff company.

The learned judge interpreted the evidence as making Yap "the most aggrieved person" in the proceeding. He came to this conclusion because Yap was a major shareholder in the plaintiff company and he practically owned 893 acres of estate land in a prime location in Johor Bahru. After executing a memorandum of agreement with Dawe on 6 December 1972 for the sale of his shares in the company, Yap, as chairman and director of the company, created the charge on the first portion to the first respondent and then transferred the second and third portions of the estate to Paramjothy and Wong Peng Fun. The sum of $2.5 million never reached the plaintiff company but went from Mr. Ng Kong Yeam, the solicitor, to Pan Orient Enterprise. The learned judge, however, considered nothing wrong in this. He found that the sum of $3.3 million, as stated in the accounts for financial year ending 30 June 1973, represented the amount of the plaintiff company's indebtedness to the first respondent company which had received on-lent to Pan Orient Enterprise. The learned judge was of the opinion that the loan was properly authorized by a resolution and that a loan made without security, in his view, amounted only to a bad judgment on the part of Yap and not actionable in damages. For this reason, he held Yap not liable under that head of the claim.

I do not think the learned judge was correct to absolve Yap altogether from liability. In my view, the liability of Yap can properly be assessed by examining his own testimony. Yap was a director of the plaintiff company and as director he was under a fiduciary duty to exercise his powers and control over the company's affairs in the best interest of the company.

When he was in the witness box, he was referred to the agreement dated 6 December 1972 between him and Dawe. He explained that Dawe wanted to buy his shares in the company for a consideration of $3.5 million. The terms of the agreement was that Dawe shall pay him $1 million within ten days from the signing of the agreement either in Singapore or in Hong Kong and the balance to be paid within two months from that date. The agreement also provided that should Dawe fail to pay the balance the agreement would become null and void. He also agreed that in paragraph 5 of the agreement he had agreed to execute a legal charge for the plaintiff company to obtain a loan for the benefit of Dawe.

He was also referred to his letter dated 27 February 1973 when he wrote to Dawe for indemnity. He said he was not happy with the delay in the payment of the shares and suggested the indemnity. When questioned on the essence of the letter of indemnity, he replied he agreed that he was to charge and transfer the property of the company as and when directed by Dawe.

While in the witness box, he was also referred to the transfer of the second and third portions to Paramjothy and Wong. He said the transfer was to Paramjothy as trustee of the plaintiff company. He admitted that the reason for the transfer was because sometimes Dawe could not get him and

other directors and it would be convenient for the property to be transferred to Paramjothy and Wong. Yap said "it was for the sake of convenience". He elaborated on what he meant by the statement that he was to charge and transfer the property for the benefit of Dawe. He admitted that he took instructions from Dawe and that was the arrangement.

It is clear therefore from Yap's own evidence that he knew that the plaintiff company was receiving no benefit from the charge and transfers. In these circumstances, Yap was indeed in breach of the duty he owed to the company to act in its best interest. The principle upon which Yap's liability is grounded can be found in *Belmont Finance Corporation* v. *Williams Furniture Ltd. & Ors. (No. 2)*[9] in the following passage at p. 405:

"A limited company is of course not a trustee of its own funds: it is their beneficial owner; but in consequence of the fiduciary character of their duties, the directors of a limited company are treated as if they were trustees of those funds of the company which are in their hands or under their control, and if they misapply them they commit a breach of trust (*Re Lands Allotment Co.* ([1894] 1 Ch. 616 at 631, 638, per Lindley and Kay L.JJ.). So if the directors of a company in breach of their fiduciary duties misapply the funds of their company so that they come into the hands of some stranger to the trust who receives them with knowledge (actual or constructive) of the breach, he cannot conscientiously retain those funds against the company unless he has some better equity. He becomes a constructive trustee for the company of the misapplied funds."

I therefore hold that Yap is liable for breach of fiduciary duty and the first plaintiff is entitled to recover damages from him.

I agree that the appeal should be allowed. As regards costs, I also agree that the appellants should be entitled to one-half of the taxed costs here and below against the first and second respondents only and that the appellants should be entitled to full costs here and below against the third respondent.

Syed Agil Barakbah S.C.J.: I have read the judgments of my brother judges, Datuk George K.S. Seah S.C.J. and Tan Sri Hashim Yeop A. Sani S.C.J., and I concur with them. There are several issues involved and I would like to touch on issues D and E together.

Issue D: Whether the transfers of the first, second and third portions of the estate to the first defendant ought to be set aside in equity.

Issue E: Whether the second defendant became a constructive trustee for the first plaintiff of the whole estate and the proceeds of sale.

The trial judge in his grounds of judgment disallowed the respondent to raise issue E and said:

"Earlier in the opening address, the plaintiffs had apparently abandoned the plea of constructive trusteeship in not making submissions on the plea against the first defendant and now under Issue E the plaintiffs presently abandon this plea against the second defendant in the light of the decision in *Than Kok Leong* v. *Low Kim Hai* ([1983] 1 M.L.J. 187). The case decided that by reason of section 6 of the Civil Law Act (Revised 1972), the English doctrine of equitable notice has no application to land dealings in Malaysia. See also *U.M.B.C. Bhd. & Anor.* v. *Pemungut Hasil Tanah, Kota Tinggi* ([1984] 2 M.L.J. 87 (P.C.)).

Now the plaintiffs seek to resurrect this plea again at this stage of their submission in reply. In my view, to allow the plaintiffs to do so would prejudice the first defendant's case. It amounts to allowing the plaintiffs to blow hot and cold at the same time and to allow the plaintiffs to renege their acceptance of the law in issue E. I therefore disallow this new argument."

Later, he held that this issue had been abandoned (see [1987] 1 M.L.J. 56 at 66). The plaintiffs, however, reserved their rights to argue the point at the appellate stage should they fail on their primary contention that the transfer of the beneficial interest in the estate to the second respondent is void under the provisions of sections 53 and 53B of the Bankruptcy Act 1967 (see p. 1027 of volume 8 part B of the appeal record). That falls under issue B. In this regard, the learned trial judge held that the second respondent was not entitled to rely on the defence in section 53B(3) of the Act (see p. 58 volume 2 part A of the appeal record). In other words, the transfer was void and the plaintiffs therefore succeeded in their primary contention. On that ground alone, the issue should not have been argued before us since the right reserved by the plaintiffs to argue before the appellate court had ceased to exist.

Before us in his submission introducing the main grounds, Mr. Chadwick for the first appellant touched on the subject of constructive trusteeship and of his intention to deal with section 340 of the National Land Code in order to show that it would not operate as a complete bar to a claim by the plaintiffs of the beneficial interest, *i.e.* the proceeds of sale of the estate by virtue of section 6 of the Civil Law Act 1956.

Mr. Rattee for the first respondent, apart from supporting the judge's conclusion that the issue had been abandoned, submitted in so far as the first respondent was concerned, that the issue of constructive trusteeship was neither raised in the pleadings nor in the opening speech of Mr. Chadwick, but raised only subsequently in the plaintiffs' submissions in reply. That was objected to and the learned trial judge disallowed the new argument after considering the objection. The decision of the judge was never raised as a ground of appeal. He further submitted that in the circumstances the issue of constructive trusteeship should not be allowed to be raised at such a late stage. With respect, we agree with Mr. Rattee's submission with regard to the first respondent. Although issue E concerned the second respondent, it is closely related to issue D, and it was the first respondent (OCF) who transferred the estate to the second respondent for value. Mr. Masacorale for the second respondent contended that since the issue had been abandoned, the first appellant should be estopped from raising it on appeal. He adopted Mr. Rattee's submission that the equitable doctrine has no application in the Malaysian law of tenure as provided by the National Land Code. He quoted as supporting authorities *Than Kok Leong* v. *Low Kim Hai,*[10] a High Court decision which was upheld by the Federal Court, and *Bagher Singh* v. *Chanan Singh*[11] which was the decision of the Court of Appeal at the material time.

In his reply, Mr. Chadwick explained that the writ was issued on 12 April 1980 when neither the first respondent nor the second respondent were registered owners of the estate or any part thereof because the registered title had been transferred to the third respondent in November 1979. There was no reason for the plaintiffs to plead reliance on section 340 of the National Land Code; the only point arising in section 340 was whether the particular transfer to the first respondent was fraudulent and which was abandoned. He submitted further that the only question that remained was whether the first and second respondents could be made to account for the proceeds of sales of the estate respectively and that was the real question throughout the proceeding. It was common ground, he said, that section 223 of the Companies Act 1965 applied to the first respondent so as to avoid the disposition of the company's property unless the court otherwise ordered by making a validation order. It should be noted that the trial judge held that the disposition of the estate which occurred after the winding up, *i.e.* at the date of the registration of the transfers, was void. The judge also made a validation order validating the transfer to the first respondent of the first appellant's interest in the estate. Both orders have been challenged on appeal.

He also conceded that the doctrine of equitable notice is not accepted in this country and submitted that that point was not relevant. It is clear therefore the issues at both D and E, in so far as the question of constructive trustee is concerned *vis-a-vis* the National Land Code, had been properly abandoned. The main question and in particular under issue D is whether the transfers of the estate made by the directors in breach of their duties as such and in contravention of section 219(2) of the Companies Act would render the transfers void under the latter.

The pertinent question that arises is under what circumstances and to what extent the equitable principles are applicable *vis-a-vis* the National Land Code.

The Torrens system as codified by the National Land Code 1965 deals with registration of land and provides simplicity and certitude in transfers of land. It is a system of conveyancing and provides indefeasibility of title to a registered owner of land against any rival claimants except in the case of fraud or similar misconduct as provided under section 340(2) of the Code. It does not prevent or restrict the creation of beneficial interests in land by way of express, implied or resulting trust arising by operation of law in Malaysia by virtue of section 3 of the Civil Law Act 1956. It does not abrogate the principles of equity but alters the application of particular rules of equity in so far as is necessary to achieve its special objects. In this way, the court is entitled to exercise jurisdiction *in personam* to insist upon proper conduct in accordance with equitable principles and norms (see *Wilkins & Ors.* v. *Kannammal;*[12] *Registrar of Titles, Johore* v. *Temenggong Securities Ltd;*[13] and *Oh Hiam & Ors.* v. *Tham Kong*[14]).

The exercise of jurisdiction *in personam* should be distinguished with the exercise of jurisdiction *in rem.* It is important to note that the doctrine of English equity does not apply with equal force to the system of registration of title to land contained in the Code. The distinction between registered and unregistered interest in land under the Code is different from that in the English law between legal estates and equitable interests in land. The Code restricts the kinds of interests in land which are capable of being registered, but at the same time it does not prevent or restrict the creation of beneficial interests in land by way of equitable trust. The position is made clear from some authorities on the matter. Where there is a valid binding

contract for the sale of land, the purchaser, when he has performed his side of the contract, acquires a right *in personam, i.e.* he acquires the right to the land as against the vendor personally but not good against the whole world. However, upon registration in accordance with the Code in his name, the vendor acquires a right *in rem, i.e.* a real right good against the world as a whole (*Bachan Singh* v. *Mahinder Kaur & Ors.*[15]). Prior to registration of the title, the statutory form of transfer under the Code gives a title in equity to the purchaser until registration. The vendor is said to hold his proprietary interest as a constructive trustee. As soon as the transfer of title is registered in his name, the estate or interest of the transferor as set forth in the instrument with all rights, powers and privileges thereto pass to the purchaser (transferee). In order to protect such equitable interest or estate, prior to the registration of transfer, a caveat may be lodged with the Registrar, and so long as it remains without being removed, it imposes restrictions on the entry in the register of dealings in land (*Bachan Singh* v. *Mahinder Kaur & Ors.*;[15] *Abigail* v. *Lapin*[16]). If the vendor commits a breach of the agreement by refusing to transfer the land to the purchaser, the latter may file a suit for specific performance of the agreement.

The sum total of the authorities cited may be summarized as follows:

(a) Where there is in the existence a right *in personam* or an equitable right prior to the registration of title to the land, the equitable principles of remedies may be applied.

(b) However, upon registration of the transfer of the said land to the purchaser who thereby obtains a right *in rem* or a real right in the property, the express provisions of the Code will apply to the exclusion of equitable principles.

Under (a), a few cases where the rules of equity are applied by our courts will demonstrate the distinction between the two categories.

In *Wilkins & Ors.* v. *Kannamal (f) & Anor.*,[12] the real issue was that of constructive trust. The Court of Appeal held that the appellant, as registered owner of the estate, held it as trustee for his wife and children to the knowledge of the first respondent to whom he transferred the titles to the estate also as trustee. The Court of Appeal held that the appellant as trustee could not alone alter the trust since he had no disposing power except over his quarter share. The transfer to the first respondent constituted her as trustee and in the absence of evidence that he exercised his disposing power, she held his share for his legal representative and the other three shares for his widow and sons and she must make registrable transfers accordingly as they directed.

The main question before the Privy Council in *Registrar of Titles, Johore* v. *Temenggong Securities Ltd.*[13] was whether the Registrar's caveat under section 320 of the National Land Code was properly entered and the word "interest" under subsection (1)(b) thereof required interpretation. It was concluded that the interests which the Registrar is empowered to protect under section 320(1)(b) of the Code are confined to interests in the land that are recognized by the Code as being either registrable or otherwise entitled to protection. That, in my view, supports the propostion that the restriction under the Torrens system does not prevent the creation of beneficial interests in land whether under express trusts, or constructive trusts or resulting trusts arising by operation of Malaysian law derived from the rules of equity in force in England in 1956.

Similarly in *Ong Chat Pang & Anor.* v. *Valliappa Chettiar*,[17] the Federal Court was faced with the petition against the rejection of the caveat lodged by the plaintiff who then successfully applied to the High Court for its reinstatement and a claim for specific performance of a contract of sale against a person claiming title from the vendor under a registered sale deed executed after the contract. It was held that the onus of proof was on the persons claiming by a title subsequent to the contract of sale to show that they were *bona fide* purchasers for value without notice of the earlier contracts.

As regards category (b) above, the facts clearly show that the title to the estate has firstly been transferred to the name of the first respondent and thereafter in the name of the second respondent.

By 30 November 1978, all the three portions of the estate were transferred to the first respondent who became the registered owner. On 30 October 1979, all the said portions were transferred by the first respondent to the second respondent who also became the registered owner thereof. Both of them had therefore obtained the right *in rem* or legal ownership for the estate in their respective points of time. In my considered

judgment, the transfer of the estate to the first respondent cannot be set aside without resorting to section 340 of the Code and alleging fraud, misrepresentation or the like under subsection (2) thereof in order to defeat the indefeasibility of title of the first respondent by virtue of having obtained the right *in rem* in the estate as the registered owner at the material time. Fraud must not only be pleaded but also particularized in the pleadings. Fraud under the Code means actual and not constructive or equitable fraud. Actual fraud must be proved in order to deprive a purchaser for value of the absolute title conferred by the Code. Actual fraud means dishonesty of some sort proved against the person whose registered title is impeached, or his agents. *Bona fide* mistake or negligence is not fraud and each case must depend on its own particular circumstances. The equitable doctrine of constructive fraud has no application under the provisions of the Code. This is the view adopted by our courts based on the decision in *Waimiha Sawmilling Co. Ltd.* v. *Waione Timber Co. Ltd.*,[18] which followed *Assets Co. Ltd.* v. *Mere Roihi.*[19] The standard of proof required to prove fraud is proof beyond reasonable doubt (see *Mohamed Isa* v. *Haji Ibrahim*[20] and the list of authorities mentioned therein).

On the grounds stated above, I hold under issue D that the transfers of the first, second and third portions of the estate to the first defendant can only be set aside pursuant to section 340(2) of the National Land Code. With regard to issue E, since it has been abandoned, the appellants were not allowed to raise it again in this appeal.

Appeal allowed.

Solicitors: *Skrine & Co.; Adnan Sundra & Low; Jackson & Masacorale.*

HARDIAL SINGH v. FARIDAH BT. HARON & ORS.

[O.Cr.J. (K.C. Vohrah J.) 18 April 1988]

[Kuala Lumpur – Federal Territory Criminal Application No. CR 54-26-87]

Criminal Procedure – Private complainant – Right of appeal and right of audience in a criminal appeal to the High Court – Whether there exists – Whether private complainant in a non-seizable case can appear on behalf of Public Prosecutor – Criminal Procedure Code (F.M.S. Cap. 6), ss. 307(i), 312(i), (ii), 313 & 376(i).

Criminal Procedure – Appeal – Reinstatement of – Application for – No notice of appeal hearing given – Whether court has inherent jurisdiction to restore appeal – Whether circumstances made it futile to do so.

The appellant instituted a private complaint against the respondents, as a result of which charges under the Penal Code were preferred against them. The trial magistrate held that she had no jurisdiction to proceed with the trial of the respondents and thus struck out the summonses against them. The appellant lodged an appeal against the magistrate's decision. On the date of the appeal hearing, the appellant was absent and the High Court therefore dismissed the appeal. The appellant then filed an application to reinstate the appeal stating that he had not been informed by the court of the date of hearing for the appeal. The Deputy Public Prosecutor who appeared for the hearing of the application objected to the application stating that a private individual cannot appear on behalf of the Public Prosecutor in a criminal appeal. The respondents also objected to the application arguing that the appellant, as a private individual, had no right of appeal.

Held, dismissing the application: (1) it is clear there is a right of appeal given to a private complainant under section 307(i) of the Criminal Procedure Code save that he cannot appeal where the defendant he prosecutes is acquitted, except with the sanction of the Public Prosecutor. As a corollary, he also has the right of audience in the High Court or on the hearing of the appeal. But where the Public Prosecutor becomes cognisant of the criminal appeal by the private complainant and he decides to intervene in the appeal, the Public Prosecutor then becomes directly involved in the appeal and either the Public Prosecutor on his behalf or any of the persons enumerated in section 378 of the Criminal Procedure Code on behalf of the Public Prosecutor will have the right of audience in the High Court. The Public Prosecutor is the appellant and the private complainant then no longer has the right of audience in the appeal before the High Court;

(2) the Criminal Procedure Code does not have an express provision allowing for the reinstatement of an appeal on the ground that no notice of the appeal hearing has been given to the appellant. However, the High Court does have inherent jurisdiction which can only be exercised in exceptional cases, and then too sparingly, in order to do justice and redress a wrong where there is no express provision to undo a wrong. Accordingly, if an appeal is dismissed solely because the appellant was absent and it can be shown that the appellant was absent at the date of hearing of the appeal because he was not given notice of the date of hearing, the appeal should be restored in the interests of justice;

(3) however, in this case, as only the Public Prosecutor would have the right of audience in the hearing of the appeal if it should be reinstated and as the Deputy Public Prosecutor who appeared on behalf of the Public Prosecutor had opposed the application, it was futile to reinstate the appeal.

Cases referred to:

(1) *Municipal Commissioner, Malacca* v. *Teh Chwee Swi* [1971] 2 M.L.J. 274 (not follod).
(2) *Ponniah* v. *Lim* [1960] M.L.J. 152 (distd).
(3) *Re Radha Krishna Naidu* [1962] M.L.J. 130 (distd).
(4) *R.* v. *Schefelaar* [1939] M.L.J. 45 (distd).